Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FRANCIS (FRANK) ALBERT,

Petitioner,

VS.

CITY OF SPARKS, BRUCE BRESLOE, TERRY REYNOLDS, SHAUN CAREY, KEN UPDIKE, AND JAMES BASS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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2988

QUESTIONS PRESENTED

1. Is the Civil Service Commission's Administrative Hearing double jeopardy against Appellant?

2. Was Appellant provided due process under US and Nevada Constitution when the court declined to hear Appellant's action, claiming the matter was res judicata and claiming collateral estoppel although all Appellants issues were not heard in the Civil Service Administrative hearing. This Civil Service Administrative Hearing addressed only the issues against Appellant, without addressing Appellants concerns of constitutional violations against Appellan.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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CITY OF SPARKS CHARTER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix "A" to the petition and is unpublished.

JURISDICTION OF THIS COURT

The date on which the highest state court decided this case was February 9, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. subsection 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Civil Service Commission Administrative Hearing violated the US Constitution, Amendment V, and Nevada Constitution, Section 8, relating to due process of law.

> Amendment V of the US Constitution states:
> **Prosecution by presentment, indictment; double jeopardy; self-incrimination; due process; property taken for public use.** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation..

Appellant also believes that his GARRITY RIGHTS have been violated, which is also a violation of the Sparks Charter (City Charter), Section X, which states, in pertinent part:

> **Section 1. Prohibited Acts:** An employee of the City who has authority to recommend, effectuate or approve the hiring, removal, promotion or discipline of another employee of the City shall not:
>
> (a) Discriminate for or against an employee or applicant for employment on the basis of race,

color, national origin, age, sex, marital status, political affiliation or physical disability, except when based upon a bona fide occupational qualification:

(b) Solicit or consider a written or oral recommendation or statement concerning a person under consideration for hiring, removal, promotion or discipline, except for

(1) A record of employment of the person maintained by an employer in the regular course of business; or

(2) An evaluation of the person's character, loyalty, ability, aptitude, suitability, qualifications or history of performance, if within the personal position for which the person is under consideration.

(c) Coerce an employee to engage in a political activity or to provide, or retaliate against an employee for refusing to provide, a political contribution or service.

(d) Deceive or willfully obstruct a person regarding his right to seek a position of employment.

(e) Influence a person to withdraw from seeking a position of employment or regulation, or state or federal law, grant a preference or advantage to an employee or applicant for employment, including defining the scope or manner of competition or the requirements for a position of employment, to assist or obstruct any person who seeks such a position;

(f) Except as specifically authorized by an ordinance, administrative rule or regulation, or state or federal law, grant a preference or advantage to an employee or applicant for employment, including defining the scope or manner of or the requirements for a position of employment, to assist or obstruct any person who seeks such a position;

(g) Retaliate against an employee or applicant for employment for disclosing information he

reasonably believes to evidence;

(1) A violation of an ordinance, administrative rule or regulation, or state or federal law; or

(2) A mismanagement or gross waste of money, an abuse of authority, or a situation that presents a substantial and specific dander to the public health or safety, unless the disclosure is:

(i) Specifically prohibited by a contract to which the City is a party and not required by an ordinance, administrative rule or regulation, or state or federal law; or

(ii) Prohibited by an ordinance, administration rule or regulation, or state or federal law; or

(iii) Prohibited by an ordinance, administrative rule or regulation, or state or federal law; or

(h) Retaliate against an employee or applicant for employment for exercising a right of appeal provided by an ordinance, administrative rule or regulation, or state or federal law.

STATEMENT OF THE CASE

Appellant argues that Respondents, on or about July 28, 1994, did wrongfully and without proper due process terminate Appellant's 17 years of satisfactory employment as a classified employee on false charges of petty theft, insubordination and failure to obey an order; not for dishonesty as asserted by Respondent's counsel.

Respondents initially attempted to terminate Appellant under a petty theft accusation (later expanded to include additional charges) relating to the taking of a police auction surplus bicycle referred to as a "Silver and Chrome BXI" on June 21, 1994; thereafter placing Appellant under paid administrative leave while an investigation was conducted June 29, 1994.

Appellant was thereafter terminated effective on the grounds of petty theft, insubordination and failure to obey an order.

Appellant then requested administrative review under his rights granted by the City of Sparks Charter, including Civil Service Commission's Administrative hearing and a review by the Second Judicial District review. Within each review request,

Appellant re-alleged actions and breaches on the part of Respondent as defined within the City of Sparks Charter (as well as Civil rights granted under both the U.S. and the Nevada Constitution. However, the Civil Service Commission failed to address such alleged violations in their review and instead confirmed Appellant's termination without consideration of Respondent's actions or failures in the termination process.

The Second Judicial District's review merely refused to disturb the decision of the Civil Service Commission; again failing to acknowledge or address Respondent's violations of Appellant's rights under the U.S. Constitution, State of Nevada Constitution and the City of Sparks Charter.

Judge Breen confirmed in his decision under Appellant's Summary Judgment Request Respondents assertions that Appellant is barred from bringing the action under the argument that Res Judicata and Collateral Estoppel as Appellant was previously heard through other venues and/or that he had failed to address additional allegations as pled within Appellant's complaint in a timely manner and therefore could not now allege the claimed violations within his

civil complaint.

Appellant filed the within appeal.

REASONS FOR GRANTING THE WRIT

I. Appellant was denied due process under the law when his Complaint was not heard, based upon res judicata and collateral estoppel.

Judge Breen's decision confirming Respondent's assertions that res judicata and collateral estoppel prohibited Appellants within civil complaint fails to acknowledge that several evidentiary facts have not yet been addressed nor has Respondent's numerous violations of its own rules and regulations been addressed resulting in its unequal and prejudicial treatment of Appellant.

The mere fact that previous administrative hearings were conducted by parties having vested interest in protecting and upholding Respondent's violations of its own code of conduct and then "rubber stamping" the previous findings does not mean Appellant's claims have been properly heard and adjudicated; only that appellant has been subjected to the arbitrary, capricious and improper application of rules and regulations Respondents were obliged to uphold and enforce in the course and scope of their duties as employer, agents and representatives of the City of Sparks to fairly and properly protect the interests of Appellant as

Respondent's employee.

Judge Breen by his decision, also confirmed the Second Judicial District erroneous refusal to disturb the administrative hearing decision on basis that "the court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact." The Second Judicial court further stated that, "an agency's conclusions of law which are of necessity closely related to an agency's view of the facts are entitled to deference and will not be disturbed unless they are not supported by substantial evidence."

The Second Judicial District Court's review never commented upon the actual evidence nor the actions of Respondent and therefore never considered that the supporting evidence indicating wrongdoing on the part of Respondents and each of them.

Appellant obviously disagrees with this position, else there would be no appeal. Appellant's objection arises from both Courts' failure to address or question how the agency determined or obtained its "view of the facts" and both courts' further failure to acknowledge or review Respondent's alleged violations of

Appellant's rights. Rather, the Second Judicial District court determined that "substantial evidence supports the agency's decisions, including....discharge for justifiable cause" and therefore the agency's decision should not be disturbed.

Unfortunately the Second Judicial District Court's review did not address nor reflect in its Order that Appellant's rights had been violated in a number of ways, that he had been subjected to unequal and prejudicial treatment given his tenure (and the fact another employee accused of the same initial violations was retained); in other words, Appellant was guilty - of what remains unclear - and regardless of the violations committed by Respondents, his termination was acceptable.

Judge Breen by his decision in favor of Respondents, and therefore upheld the Second Judicial Review findings, failed to acknowledge or address Appellants allegations of Respondent's misconduct and Respondent's willful violations and failure to provide and protect Appellant's right to Due Process. Instead, Judge Breen looked only at Respondent's conclusion and merely affirmed same.

Appellant therefore asserts that the violations as alleged in each of his actions have yet to be addressed by any venue (only the agencies conclusions have bene considered), and therefore the instant appeal is proper and timely.

Appellant asserts that various versions of the following have been presented, but Appellant's allegations regarding Respondent's violations and failings as they related to the facts have not yet been addressed by any previous reviewing agency including the Second Judicial District Court and Judge Breen's confirmation of res judicata and collateral estoppel do not apply.

A) That the combined auction between the City of Sparks and Sparks Police Department was the first to occur and resulted in extreme confusion on the part of all parties, including Plaintiff and that there had never been any rules, regulations or standard of care (written or verbal) relating to the taking of surplus or junk items by city personnel including immediately following the subject joint auction and in fact, a standard of "fair game" was always previously applied and condoned by the City and its supervisors including Appellant's supervisor, Respondent Carey, on the day of

the incident.

B) That the subject incident resulted in a memo to all public works employees regarding the "removal of City Property from Trash Dumpsters" which was a direct result of the incident involving Appellant and his actions taken on reliance of the previous "fair game" rule and was being provided to clarify the removal of surplus or junk property by city employees.

C) Appellant further asserts that the following facts have never been addressed, even in Judge Breen's decisions, even though they were properly alleged within Appellants original civil complaint, Motion for Reconsideration and Motion for Summary Judgment:

The ore-termination hearing conducted by Respondents occurred on July 13, 1994 and termination for the above charges was noticed to Appellant effective July 28, 1994.

During the investigation interview on June 28, 1994, Respondents provided a guarantee by the CITY that neither Appellant's statement nor any information or evidence which was gained by reason of such statements made during the investigation

would be used in any subsequent state or federal criminal proceeding under Appellant's GARRITY RIGHTS.

During the investigative interview, Appellant provided an honest disclosure relating to both the incident as well as other examples of waste and mismanagement regarding purchases of certain items at an additional expense to the City in the approximate sum of $6,000/year for a total of 11 years, as well as other waste and mismanagement that were occurring.

Section 1(g) (2) under SCS Regulation X-Prohibited Acts of "retaliation against an employee or applicant for employment for disclosing information he reasonably believes to evidence: (of) a mismanagement or gross waste of money, an abuse of authority..." To date, no venue has reviewed this cause of action and Plaintiff, therefore asserts again that res judicata and collateral estoppel do not apply in this action.

II **The Civil Service Commission's Administrative hearing was double jeopardy against Appellant, charging him with the same charges that he had already been to court and found not guilty on.**

Respondents then used the Civil Service Commission to conspire to retaliate against and terminate Appellant using the false charges of petty theft which had already been dismissed in Judge Cray's court.

Appellant had a right to have a "just cause" basis for termination, but instead was subjected to a different and unequal standard of treatment than a co-worker, named ROBBINS, who was also charged with petty theft. ROBBINS pleaded nolo contendere rather than fight the charges as Appellant did, and remains in the employ of Respondents after only a two week suspension.

The Sparks Civil Services Commission upheld Respondent's termination without a) addressing any of the above referenced facts and; b) obtaining sufficient information to prove the basis for Appellant's termination, (insubordination, failure to obey an order, petty theft). Instead the commission accepted the

above in violation of applicable codes and regulations in order to support the alleged basis for dismissal and confirm the reckless, willful and repeated violations of Appellant's rights as pled in his complaint.

Subsection (h) under SCD Regulation X - Prohibited Acts, prohibits "retaliation against an employee or applicant for exercising a right of appeal provided by ordinance, administrative rule, or regulation, or state of federal law."

Appellant believes and thereon alleges that the City Attorney for Sparks did willfully violate this subsection. By requesting that the Reno City Attorney, Mr. GARDNER, to make an official complaint with the City of Sparks Municipal Court for Petty Theft nine days after Plaintiff exercised his right of appeal. This again has not been addressed by any previous venue.

Despite this and in direct violation of both this specific assurance and Appellant's rights as guaranteed under Article X, Section 1(b) which provides "that the City may not solicit an oral statement or affidavit of a citizen to be used in any disciplinary proceedings, and 1(g) (2) which prohibits "retaliations against an

employee or applicant for employment for disclosing information he reasonably believes to evidence: (of) a mismanagement or gross waste of money, an abuse of authority..." Respondents ultimately dismissed Appellant for petty theft, insubordination and failure to obey an order basing their charges on his testimony as obtained and used in violation under Article X, section 1(g)(2).

Respondent further violated this section by retaliating against Plaintiff for his allegations of mismanagement by filing formal charges under a municipal court action on or about August 4, 1996 for petty theft; wrongly using Plaintiff's own statements as obtained during the investigative hearing and witness FENWICK's statement gained by reason of such statements made during the investigation - all in direct violation of both the city's specific assurance and Appellant's rights as guaranteed under Article X, Section 1(b) of the City's own Civil Service Regulations (providing that the City may not solicit an oral statement or affidavit of a citizen to be used in any disciplinary proceeding.

Respondent's against violated both their assurances and Appellant's rights under the City's own Civil Service Regulations in

open court by attempting to introduce at trial the testimony and written statement of Respondent's primary witness FENWICH in support of Respondent's charges as filed.

As a result the Municipal Court judge in the petty theft matter refused to allow same in, that it was improperly obtained and in fact, found Appellant not guilty and further provided that Appellant was a "person who made a mistake."

While Respondents assert that statute of limitations apply to the mismanagement allegations, Respondents would have the court accept that Appellant is barred from the current action for res judicata for anything already asserted under previous venues and then argues that Appellant is also barred for not having brought these allegations under previous venues. Respondents conveniently fail to acknowledge the principle of res judicata as it applies to Appellant's criminal court decision of "not guilty."

It is brought to the attention of the court that all previous venues and reviews including Judge Breen have failed to address Respondent's willful failure to comply with the City's own Article X, section 1(b) of the City's own Civil Service Regulations in its

motion to dismiss and completely ignores the municipal court's determination of "not guilty" in a court of law. If one is found not guilty of an underlying charge of petty theft, how can he be found guilty by the administrative agency of the ancillary charges that supported the original charge of theft? Double jeopardy comes to mind.

Judge Breen in his decision under Appellant's Motion for Summary Judgment reaffirmed this conclusion again failing to address any of the issues as detailed herein. Hence the within appeal.

Respondents further violations of its duty under ARTICLE XI, SECTION 2(a) OF THE CITY'S CIVIL SERVICE REGULATIONS that, "if the City Manager dismisses a classified employee" notice thereof, together with a full statement of the reasons, shall be immediately filed with the Commission and a copy served upon the employee. ARTICLE XI, SECTION 2(e) OF THE CITY'S CIVIL SERVICE REGULATIONS further provides that "the City Manager or designated representative within forty eight (48) hours of the close of the pre-termination hearing will forward

his or her decision to the employee and the Civil Service Commission.

In fact, and in direct violation of the above regulations governing the noticing of a terminated employee, Appellant was never provided proper or full notice as required and further violations were made by Respondents by failing to forward the decision to terminate Appellant to the Commissioner within 48 hours of the close of the pre-termination hearing as required under the above mentioned code. The regulations codified in Article XI, Section 2(a) clearly provided for more than simple recitation of the charges and alleged offenses. "Notice thereof, together with a full statement of the reasons" is clearly conjunctive in nature and requires that both a notice of the charges and a full statement of the reasons for proposed termination is to be provided to the employee and copied to the Commission. This is in compliance with the Civil Service Reform Act of 1978, subsection 7543.

Instead, Respondents BRESLOE, REYNOLDS, CAREY, UPDIKE and BASS improperly exercised "discretionary functions(s) or duty(s), willfully and intentionally violated a lawful

and valid regulation they were required to both uphold and enforce, to wit: Article XI, section 2 (a) and (e) of the City's Civil Service Regulation and therefore, these Respondents should be subject to all penalties for violations of the section.

Likewise, Respondents in their employment utterly failed to comply with Article XI Section 2(e) of the CSC Regulations which provides The City Manager or designated representative within forty eight (48) hours of the close of the pre-termination hearing will forward his or her decision to the employee and the civil service commission. While the decision was forwarded to Appellant within forty eight hours, it was not sent to the Commission until July 28, 1994; well beyond the mandatory forty-eight hours, required by CSC Regulations. Further, to date, no full explanation has ever been provided to Appellant.

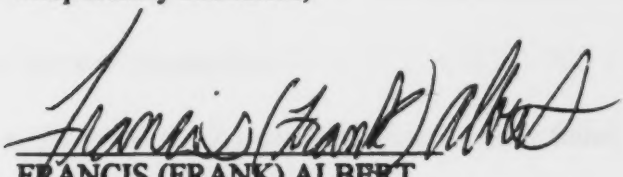
All of the above demonstrated a willful and intentional failure by Respondent, and each of them to comply with Respondents own rules, regulations, verbal representations and responsibilities as required by aforementioned sections of the Civil Service Regulations.

None of the previous venues have allowed for the above facts and violations to be addressed and again Appellant offers that Judge Breen's confirmation of res judicata and collateral estoppel is in error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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JUD... C. Parsley

BY... DEPUTY

Case No. CV96-04740

Department No. 7

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

FRANCIS (FRANK) ALBERT,

Plaintiff,

ORDER

vs.

THE CITY OF SPARKS, et al,

Defendants.

/

Plaintiff Albert has instituted this action pro se and his claims are not clearly stated. It appears that he is asserting a claim for wrongful termination, due process and Sixth Amendment violations, violations of the Sparks Civil Service Commission regulations, violations of the Sparks Municipal Code, conspiracy, false arrest and malicious prosecution, and intentional misrepresentation.

Defendants filed a motion to dismiss this action which is based upon res judicata and collateral estoppel. See Britton v. City of North Las Vegas, 106 Nev. 690 (1990). Britton sets out the following elements for res judicata: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the action in question, (2) whether there was a final judgment on the merits, and (3) whether the party against whom the judgment is asserted was a party, or in privity with a party to

the prior adjudication. The question here is whether or not the issues in the prior adjudication are identical.

The defenses of res judicata and collateral estoppel are affirmative defenses and are more appropriatly addressed in a motion for summary judgment. The question before this court is whether or not relief can be granted upon the asserted claims. It appears that a hearing in a prior adjudication was to determine if there was substantial evidence to support the employing agency's determination of terminating employment. The various issues raised in this complaint were not necessarily decided by Judge Kosach or the City of Sparks Civil Service Commission's hearing officer in Francis Albert v. City of Sparks, Case #CV95-04813. Plaintiff's complaint meets the requirements of NRCP 12 (b) (5). Therefore, the motion to dismiss is and should be denied.

When the inevitable motion for summary judgment is asserted, the parties shall submit a five page summary with each brief. I say this because the motions and authorities and the incorporated petition for judicial review submitted in this case were voluminous.

IT IS SO ORDERED.

DATED: This 24 day of January, 1997.

Peter I. Breen

DISTRICT JUDGE

BEST AVAILAB

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCIS (FRANK) ALBERT,

Appellant,

vs.

THE CITY OF SPARKS,

Respondent.

No. 30824

FILED

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JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Rubach

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court granting respondent's countermotion for summary judgment. Having reviewed the record, we conclude that the district court did not err in granting summary judgment. See NRCP 56; Britton v. City of North Las Vegas, 106 Nev. 690, 799 P.2d 568 (1990). Accordingly, we

ORDER this appeal dismissed.[1]

Young, J.

Shearing, J.

Leavitt, J.

APPENDIX A

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